Supreme Court, U.S.
FILED
98 352 AUG 27 1998
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

AT&T UNIVERSAL CARD SERVICES, INC.,
Petitioner,

v.

BENETHEL REMBERT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARDO I. KILPATRICK
Counsel of Record
SHERMETA, CHIMKO & KILPATRICK, P.C.
445 S. LIVERNOIS, SUITE 221
P.O. BOX 5016
ROCHESTER HILLS, MI 48305-5016
(248) 652-8200

Attorney for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

63 pp

QUESTION PRESENTED

1. May a bankruptcy court consider evidence of a debtor's financial status and history of credit card use related to gambling activities in determining whether a debt to a creditor is nondischargeable under 11 U.S.C. § 523(a)(2)(A)?

2. Were the rulings of the federal district court and United States Court of Appeals for the Sixth Circuit, in not considering evidence of a debtor's fraudulent intent in a 11 U.S.C. § 523(a)(2)(A) nondischargeability case, in violation of a proper appellate review of a bankruptcy court's finding of fact pursuant to this Court's decision in *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985)?

PARTIES TO THE PROCEEDING

In addition to the Parties named in the caption, City Bank (South Dakota), N.A. appeared as a plaintiff-appellant before the Sixth Circuit. City Bank (South Dakota) N.A. is a subsidiary of Citicorp Holding, Inc. (parent).

AT&T Universal Card Services, Inc. is a subsidiary of AT&T Corporation (parent).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ii

PARTIES TO THE PROCEEDING iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 7

I. This Is A Case Concerning The Issue Of A Debtor's Fraudulent Intent Under 11 U.S.C. § 523(a)(2)(A), The Courts That Have Addressed This Issue Disagree On The Method Of Evaluating The Debtor's Intent With Respect To This Court's Decision In *Field v. Mans*, 516 U.S. 59 (1995), This Case Provides The Supreme Court With An Opportunity To Establish The Proper Analysis To Be Employed By Courts To Determine The Debtor's Fraudulent Intent Under 11 U.S.C. § 523(a)(2)(A). 7

II. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings On the Deference Afforded A Trial Court As To Findings Of Fact. 13

CONCLUSION 14

APPENDIX

Appendix A
Opinion of the United States Court of Appeals for the Sixth Circuit Affirming the Federal District Court's Reversal of the Bankruptcy Court that Granted the Dischargeability of Respondent's Debts under 11 U.S.C. § 523(a)(2)(A) 1a

Appendix B
Order of the United States Court of Appeals for the Sixth Circuit Denying the Petitioners Suggestion for Rehearing En Banc 18a

Appendix C
Amended Opinion and Order of the Federal District Court for the Eastern District of Michigan Reversing the ruing of the Bankruptcy Court and Granting Dischargeability of Appellant's Debts Under 11 U.S.C. § 523(a)(2)(A) 20a

Appendix D
Order of the Bankruptcy Court for the Eastern District of Michigan Declaring Debt Nondischargeable and for Judgment in Favor of Plaintiff 38a

Appendix E
Article from the Lawyers Weekly USA dated May 4, 1998 entitled "Credit Cards Easier to Discharge" at page 1 and page 19 . . . . . 41a

TABLE OF AUTHORITIES

Cases:

Page

In re Alvi, 191 B.R. 724
(Bankr. N.D. Ill. 1996) 5

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985) 13,14

AT&T v. Herrig (In re Herrig), 217 B.R. 891
(Bankr. N.D. Okla. 1998) 9

AT&T Universal Card Serv. Corp. v. Feld (In re Feld),
203 B.R. 360 (Bankr. E.D. Pa. 1996) 9

AT&T Universal Card Serv. Corp. v. Wong (In re Wong),
207 B.R. 822 (Bankr. E.D. Pa. 1997) 9

Citibank (South Dakota), N.A. v. Eashai, (In re Eashai),
87 F.3d 1082 (9th Cir.1996) 9

Field v. Mans,
516 U.S. 59 (1995) 6,7,8,9,10,11,12

First Nat'l Bank of Mobile v. Roddenberry,
701 F.2d 927 (11th Cir. 1983) 9

Grogan v. Garner,
498 U.S. 279 (1991) 5

Longo v. McLaren (In re McLaren),
3 F.3d 958, 961 (6th Cir. 1993) 5

Manufacturer's Hanover Trust v. Ward (In re Ward),
857 F.2d 1082 (6th Cir. 1988) 5

Rembert v. AT&T Universal Card Services, Inc. (In re Rembert),
141 F.3d 277 (6th Cir. 1998) 1,2

Rembert v. Citibank South Dakota, N.A. (In re Rembert),
219 B.R. 763 (E.D. Mich. 1996) 1

Statutes:

11 U.S.C. § 523(a)(2)(A) 3,7,8,9,12,14

28 U.S.C. § 1254(1) 1

Other Authorities:

Jake Halpren, *Credit Card Easier to Discharge: No 'Fraud' Despite Inability to Pay*, Lawyers Weekly U.S.A., May 4, 1998, at 18 13

The Honorable David F. Snow, *The Dischargeability of Credit Card Debt: New Developments and the Need for a New Direction*, 72 Am. Bank. L.J. 63, 80 (1998) 10

RESTATEMENT (SECOND) OF TORTS (1977) 11

Petitioner, AT&T Universal Card Services, Inc. ("AT&T"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Rembert v. AT&T Universal Card Services, Inc. (In re Rembert)*, 141 F.3d 277 (6th Cir. 1998) (App. A). The opinion of the federal district court is reported at *Rembert v. Citibank South Dakota, N.A. (In re Rembert)*, 219 B.R. 763 (E.D. Mich. 1996) (App. C). The opinion of the bankruptcy court is not published but is reproduced as App. D.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on April 9, 1998. The Court of Appeals denied a timely petition for rehearing on May 29, 1998 (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Overview

This petition arises from the failure of the federal district court and United States Court of Appeals for the Sixth Circuit to leave findings of fact, made by the bankruptcy court in an 11 U.S.C. § 523(a)(2)(A) nondischargeability case, undisturbed in the absence of clear error. In order to fully

understand the issues presented in this petition, a brief recitation of the facts is necessary.

Appellee, Benethal Rembert ("Rembert") had two revolving credit accounts with Appellant, AT&T Universal Card Services ("AT&T"). The first account was opened in April of 1994, the second account was opened in September of 1994. At the time Rembert opened these accounts (and through the filing of her bankruptcy petition), she was continuously employed by Chrysler Motors. App. A at 3a-4a. Rembert began experiencing financial difficulties in 1993 as a result of an automobile accident which caused her to miss work for several months. Rembert's financial problems were increased between 1994 and 1995 when she was unable to work overtime, which reduced her income by one third. App. A at 3a-4a. In June of 1994, Rembert began gambling at a casino in Windsor, Ontario. By January 2, 1995, Rembert had lost a sum of between $18,000.00 and $24,000.00. Rembert acquired thousands of dollars in cash advances from her credit cards, including her AT&T accounts, to finance her gambling. To satisfy this increased debt load, Rembert acquired a second mortgage on her home in November of 1994. The majority of the proceeds from the second mortgage ($28,000.00) was used to pay credit card obligations, which included a $3,051.86 payment to AT&T. App. A at 4a.

In spite of Rembert's awareness of her pre-existing financial problems, which were exacerbated by her gambling and the acquisition of a second mortgage to consolidate her credit card debts, Rembert deliberately continued to gamble by withdrawing cash advances on her AT&T and other credit card accounts. From November of 1994 through March of 1995 Rembert made payments of $1,549.19 on her AT&T accounts. App. C at 24a. Rembert's continued gambling

resulted in her filing a Chapter 7 petition for bankruptcy on April 20, 1995. At the time she filed her bankruptcy petition, Rembert owed over $5,000.00 on her AT&T credit cards, the majority of this debt was attributable to cash advances for gambling. AT&T brought suit against Rembert in her bankruptcy case, under 11 U.S.C. § 523(a)(2)(A), to have Rembert's debts owed to AT&T deemed nondischargeable. App. A at 4a-5a.

Holding of the Bankruptcy Court

After a Trial was conducted on AT&T's nondischargeability complaint the bankruptcy court found that Rembert's debts to AT&T were nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). In making this determination, the bankruptcy court indicated that:

> The debtor testified here today that at the time she incurred the debts at issue, using these credit cards primarily for gambling purposes -- she expected and knew that the only way she would be able to repay them was through gambling winnings. She also recognizes now, and it is of course objectively true, that is not a reasonable expectation.
> * * *
> [T]he court concludes that by a preponderance of the evidence the Plaintiff has established at the time she incurred this debt, the Debtor did not intend to repay, and knew that she would not reasonably be able to repay.
> * * *
> She may have hoped in her heart of hearts that she would be able to repay, but she knew that it was not objectionably realistic, or real -- or

> reasonable to have the ability or intent to repay.[1]

The bankruptcy court's decision was based on Rembert's state of mind at the time she acquired the cash advances from AT&T. App. C at 31a-32a.

Holdings of the District and Circuit Courts

Both the federal district court and the Sixth Circuit Court of Appeals began their review of the bankruptcy court's decision by correctly stating that they would review the bankruptcy court's findings of fact for clear error and the bankruptcy court's conclusions of law de novo. App. A at 6a; App. C at 25a-26a. Both courts also correctly stated that a finding of fact is clearly erroneous if the reviewing court, after examining the evidence, is left with the firm conviction that a mistake has been committed. App. A at 6a-7a; App. C at 26a.

The district and circuit courts also stated that a creditor, in order to except a debt from discharge, must prove the following elements:

> (1) the debtor obtained the money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the

---

[1] App. C at 24a-25a.

proximate cause of loss.[2]

In addition, both courts cited *Grogan v. Garner*, 498 U.S. 279, 291 (1991), as authority requiring a creditor to prove each element of a § 523 claim by a preponderance of the evidence, and *Manufacturer's Hanover Trust v. Ward (In re Ward)*, 857 F.2d 1082, 1083 (6th Cir. 1988), which provides that exceptions to discharge are to be strictly construed against the creditor. App. A at 8a; App. C at 27a.

The district court, in reversing the bankruptcy court's decision, found that the circumstances surrounding Rembert's use of her credit cards could not be used to establish fraudulent intent. The district court cited authority for the proposition that, "The fact that Appellant [Rembert] hoped to pay her debts through gambling winnings is not per se unreasonable."[3] In addition, the district court compared gambling to risky investment and noted, "Unfortunately, bankruptcy is the route taken by many individuals whose risky investments do not pan out." App. C at 33a. Therefore, since Rembert had relied on gambling winnings to repay her debts, the district court determined, "There is no basis for finding that Ms. Rembert made a false representation to Appellees [AT&T] when she incurred debts in the latter part of 1994." App. C at 33a.

In considering whether Rembert intended to repay her

---

[2] *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993). The Sixth Circuit Court of Appeals' citation of this case is found at App. A at 7a-8a. The federal district's court citation to this case is found at App. C 26a-27a.

[3] App. C at 32a. The district court cited *In re Alvi*, 191 B.R. 724,734 (Bankr. N.D. Ill. 1996), as support for this statement.

obligations, the district court did not apply a subjective justifiable intent analysis. App. C at 27a n.5. Instead, the court focused on Rembert's statements of her intention to repay presented to the bankruptcy court. Since the district court did not consider Rembert's circumstances combined with her borrowing to gamble as reckless or careless evidence of fraudulent intent, it did not find any evidence to substantiate the decision of the bankruptcy court. App. C at 33a.

The Sixth Circuit Court of Appeals affirmed the district court's reversal of the bankruptcy court but changed the analysis used to determine Rembert's intent at the time she withdrew the cash advances on her AT&T credit card. Specifically, the court focused on the first two elements of the *McLaren* test (listed above) – material representation and intent to defraud. App. A at 8a.

The circuit court began its fraud analysis by citing *Field v. Mans*, 516 U.S. 59 (1995), as support for the rule that a "subjective standard" is used to determine a debtor's fraudulent intent. App. A at 8a. Since Rembert's "subjective fraudulent intent" would be determined at the time she had taken cash advances on her AT&T credit card, it was necessary for the court to consider the nature of representations made when a debtor uses a credit card. App. A at 8a.

The circuit court analyzed those cases that addressed what type of representation is made when a credit card is used. The circuit court rejected the line of cases which hold that a debtor's use of a credit card is a representation that the debtor has the ability to repay the debt. The court adopted the line of decisions which hold that the representation made by a credit card user is simply an "intention to repay" and nothing more,

and therefore severed the direct link between a debtor's financial condition and their intention to repay credit card debts as those debts are incurred. App. A at 9a-10a. The conclusion that the representation made by the use of a credit card is simply an "intention to repay" led the court to confine its analysis to Rembert's subjective fraudulent intent. App. A at 10a. The court stated that a subjective analysis of a debtor's fraudulent intent would be difficult to establish, and therefore, Rembert's subjective fraudulent intent would be ascertained by a totality of the circumstances. App. A at 10a.

The circuit court's review of the facts in this case led it to the conclusion that Rembert's conduct showed her subjective intent to repay AT&T. The court supported its position by citing Rembert's payment of creditors with proceeds she had acquired from the second mortgage on her home and the fact that she had continued to make payments to AT&T even after she had stopped acquiring cash advances. App. A at 12a-13a. Therefore, the court concluded that under the totality of the circumstances test, Rembert lacked the required subjective fraudulent intent to except her debt to AT&T from discharge. The court affirmed the district court's reversal of the bankruptcy court without reviewing the other required elements of fraud under 11 U.S.C. § 523(a)(2)(A).

REASONS FOR GRANTING THE WRIT

I. This Is A Case Concerning The Issue Of A Debtor's Fraudulent Intent Under 11 U.S.C. § 523(a)(2)(A), The Courts That Have Addressed This Issue Disagree On The Method Of Evaluating The Debtor's Intent With Respect To This Court's Decision In *Field v. Mans*, 516 U.S. 59 (1995), This Case Provides The Supreme Court With An

Opportunity To Establish The Proper Analysis To Be Employed By Courts To Determine The Debtor's Fraudulent Intent Under 11 U.S.C. § 523(a)(2)(A).

Courts disagree on how to assess a debtor's fraudulent intent under the Bankruptcy Code's nondischargeability provision of 11 U.S.C. § 523(a)(2)(A). This confusion continued after this Court's decision in *Field*. In *Field*, the Court clarified the standard of reliance by a creditor in a § 523(a)(2)(A) action to render debts nondischargeable. The Court in holding that § 523(a)(2)(A) requires a creditor to prove justifiable reliance stated that, "We construe the terms in § 523(a)(2)(A) to incorporate the general common law of torts, the dominant consensus of common law jurisdictions, rather than the law of any particular State."[4]

In establishing that § 523(a)(2)(A) required justifiable reliance, the court cited the following language in rejecting the standard of a "reasonable person" when determining reliance on a debtor's statement: "Prosser represents common-law authority as rejecting the reasonable person standard here, stating 'the matter seems to turn upon an individual standard of the plaintiff's own capacity and the knowledge which he has, or which may fairly be charged against him from the facts within his observation in the light of his individual case.'"[5] The holding in *Field* has not provided courts with a uniform rule on how to measure a debtor's fraudulent intent under § 523(a)(2)(A).

---

[4] *Field v. Mans*, 516 U.S. 59, 71 (1995).

[5] *Field*, 516 U.S. at 72 (citing Prosser and Keeton on Law of Torts § 108, p. 717 (5th ed. 1984)).

Some courts apply the subjective standard found in *Field* and require that a creditor show a debtor's subjective fraudulent intent in order to prevail in a § 523(a)(2)(A) action.[6] Other courts have used a list of objective factors, sometimes called the "Totality of the Circumstances" approach, to be considered in determining whether the debtor had the recusant intent to deceive.[7]

Two other approaches are employed by courts to resolve the fraudulent intent issue by implication. The "Implied Representation Theory" holds that each time a credit card is used, the debtor has made an implied representation of both the intent and the ability to repay the debt.[8] Under this theory, creditors can establish the debtor's fraud by showing the debtor's hopeless financial condition at the time credit card debts were incurred. On the other end of the spectrum is the "Assumption of Risk" approach. This theory holds that a debtor's credit card obligations will be discharged as long as the creditor has not informed the debtor of the revocation of his/her credit privileges. This theory holds that credit card issuers assume the risk associated with a the debtor's use of credit cards.[9]

The case law dealing with credit card nondischargeability,

---

[6] *See, e.g., AT&T v. Herrig (In re Herrig)*, 217 B.R. 891, 895-96 (Bankr. N.D. Okla. 1998); *AT&T Universal Card Serv. Corp. V. Feld (In re Feld)*, 203 B.R. 360, 365 (Bankr. E.D. Pa. 1996).

[7] *See, e.g., Citibank (South Dakota), N.A. v. Eashai, (In re Eashai)*, 87 F.3d 1082, 1087-88 (9th Cir.1996).

[8] *See, e.g., AT&T Universal Card Serv. Corp. V. Wong (In re Wong)*, 207 B.R. 822, 827 (Bankr. E.D. Pa. 1997).

[9] *See, e.g., First Nat'l Bank of Mobile v. Roddenberry*, 701 F.2d 927, 932 (11th Cir. 1983).

as seen above, is not consistent. Since the *Field* decision, the courts have migrated toward the common law/subjective approach to determine a debtor's fraudulent intent under § 523(a)(2)(A). Courts that have applied the subjective intent approach have been quite rigorous in their analysis. As one bankruptcy judge has stated:

> In choosing subjective rather than objective reliance, Field v. Mans appeared to provide courts a rationale for finding credit card debt dischargeable if the debtor intended to pay it no matter how unreasonable that intent appeared based upon the debtor's objective circumstances. The courts conveniently overlooked the fact that the common law was not nearly as subjective in its approach to scienter as this invocation of Field v. Mans suggests. The Restatement of Torts finds a misrepresentation fraudulent if the maker 'knows that he does not have the basis for his representation that he states or implies.' Surely many unemployed and insolvent debtors must know that they don't "have the basis" to represent that they intend to pay the charge incurred, as many courts prior to Field v. Mans were quick to observe, and some still are.[10]

In the instant case, the district court indicated that the subjective justifiable standard of the *Field* case did not apply

---

[10] The Honorable David F. Snow, *The Dischargeability of Credit Card Debt: New Developments and the Need for a New Direction*, 72 Am. Bank. L.J. 63, 80 (1998).

because *Field* dealt with reliance on the part of the creditor, not the debtor's intent. The court stated, "Fraud implied in law, or which may exist without imputation of bad faith or immorality is insufficient." App. C at 299. Further, the court stated that, "If room exists for the court to infer an honest intent, the issue of dischargeability must be decided in favor of the debtor." App. C at 29a. Given the restrictions used by the district court in assessing a debtor's scienter, it is not surprising that the court could not find any evidence of the debtor's intent to defraud AT&T in this case. The Second Restatement of Torts, in discussing the requirements of fraudulent intent, provides that, "A misrepresentation is fraudulent if the maker knows that he does not have the basis for his representation that he states or implies."[11] The comment explaining this provision of the restatements states, "This is often expressed by saying that fraud is proved if it is shown that a false representation has been made without belief in its truth or recklessly, careless of whether it is true or false."[12] Applying the common law definition of scienter in the instant case, there existed in the record evidence of Rembert's reckless and/or careless representation based on her financial condition and gambling experience.

The Sixth Circuit Court of Appeals contradicted the standard used by the district court in affirming the reversal of the bankruptcy court's decision. The circuit court, citing the *Field* case as controlling, measured the debtor's fraudulent intent according to a subjective standard. App. A at 8a. The court could find no evidence indicating that Rembert had used her AT&T credit cards without intending to repay the debt. The court gave no weight to Rembert's trial testimony that her

---

[11] RESTATEMENT (SECOND) OF TORTS § 526(c) (1977).

[12] RESTATEMENT (SECOND) OF TORTS § 526 cmt. e (1977).

belief in repayment through gambling winnings was objectively unreasonable. App. A at 12a-13a. Yet, this testimony is clear evidence of Rembert's reckless or careless intentions regarding repayment of obligations taken on her AT&T cards. Further, Rembert's financial circumstances and gambling history are evidence that would be relevant to a common law misrepresentation analysis. It was this evidence, combined with Rembert's testimony, that the bankruptcy court considered in rendering its decision.

In addition, the circuit court cited Rembert's payment of creditors with proceeds acquired from a second mortgage and the continued payments to AT&T as evidence of her intent to repay the credit card obligations. In contrast, the fact that Rembert's gambling losses required her to obtain a second mortgage increased the evidence of her carelessness associated with her further cash withdraws for gambling purposes. The fact that Rembert continued to make payments on her AT&T credit card debts can also be viewed as an attempt by Rembert to induce AT&T's reliance on her representations to allow her to make further cash advances.

The varying rigid standards used by both the federal district court and Sixth Circuit Court of Appeals in analyzing Rembert's fraudulent intent is not in conformance with common law standards of misrepresentation that were incorporated into § 523(a)(2)(A) through the *Field* decision. In highlighting the rigid standard of proof that has been applied in this case, debtors' attorneys have been advised to have their clients testify that: 1) they didn't incur the debts immediately prior to filing bankruptcy; 2) they attempted to work out a payment plan with their creditors; and 3) they

wanted to repay the debt but were unable to do so.[13] In addition, the following advice was given after the Sixth Circuit issued its decision in this case: "debtors should always try to propose a payment plan to their creditors and make a few payments to show their good faith"[14]

II. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings On the Deference Afforded A Trial Court As To Findings Of Fact.

Both the federal district court and the Sixth Circuit Court of Appeals set aside the findings of fact made by the bankruptcy court in this case. As detailed in the previous section, Rembert's financial circumstances and her history of gambling losses are evidence that was considered by the bankruptcy court in making its determination that Rembert did not have an intent to repay AT&T for the cash advances she had taken in order to gamble.

In *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, (1985), the court stated that, "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them can not be clearly

---

[13] Jake Halpren, *Credit Card Easier to Discharge: No 'Fraud' Despite Inability to Pay*, Lawyers Weekly U.S.A., May 4, 1998, at 18. This information can be found at App. E at 43a.

[14] App. E at 43a.

erroneous."[15] In the instant case, the bankruptcy court judge was able to evaluate the veracity of Rembert's statements as she testified at the nondischargeability trial. App. C at 24a-25a. The bankruptcy court judge asked Rembert specific questions and used this testimony, combined with the evidence of Rembert's carelessness in pursuing cash advances on her AT&T credit cards for gambling, to support his finding of nondischargeability. Given this Court's holding in the *Anderson* case, both the federal district court and the Sixth Circuit Court of Appeals displaced the findings of the bankruptcy court with evidence they preferred.

CONCLUSION

This case presents the Supreme Court with the opportunity to establish the proper analysis to be employed by courts in assessing the intent of a debtor in an 11 U.S.C. § 523(a)(2)(A) nondischargeability complaint. In addition, this Court can rectify the violation, by the federal district court and the Sixth Circuit Court of Appeals, of this Court's prior rulings concerning the role of an appellate court in reviewing the factual findings of a trial court. The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

SHERMETA, CHIMKO & KILPATRICK, P.C.
Counsel for Petitioner

---

[15] *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573-74 (1985).

By: /s/_____

RICHARDO I. KILPATRICK (P35275)
Counsel of Record
445 S. Livernois, Suite 221
P.O. Box 5016
Rochester Hills, MI 48308-5016
(248) 652-8200

APPENDIX

APPENDIX A

No. 96-2293

Filed April 9, 1998
Clerk, United States District Court
Eastern District of Michigan at Detroit

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24
ELECTRONIC CITATION: 1998 FED App. 0106P
(6th Cir.) File Name: 98a0106p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: BENETHEL REMBERT, *Debtor*	)	
BENETHEL REMBERT, *Appellee*,	)	
v.	)	**No. 96-2293**
AT&T UNIVERSAL CARD SERVICES, INC.; CITIBANK SOUTH DAKOTA, N.A., *Appellants.*	)	

No. 96-2293 *In re Rembert*

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
Nos. 96-70315; 96-70317

Paul D. Borman, District Judge.
Argued: October 31, 1997

Decided and Filed: April 9, 1998

Before: **KRUPANSKY**, **DAUGHTREY**, and **COLE**, Circuit Judges.

COUNSEL

ARGUED: Richardo I. Kilpatrick, SHERMETA, CHIMKO & KILPATRICK, Rochester Hills, Michigan, for Appellants. Adam L. Wiener, LAW OFFICES OF DAVID H. LEWISTON, Southfield, Michigan, for Appellee. ON BRIEF: Richardo I. Kilpatrick, SHERMETA, CHIMKO & KILPATRICK, Rochester Hills, Michigan, for Appellants. Adam L. Wiener, LAW OFFICES OF DAVID H. LEWISTON, Southfield, Michigan, for Appellee.

COLE, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. KRUPANSKY, J. (pp. 11-13), delivered a separate concurring opinion.

OPINION

R. GUY COLE, JR., Circuit Judge. Appellants AT&T Universal Card Services, Inc. CAT&T") and Citibank South Dakota, N.A. ("Citibank") appeal the district court's order that reversed a judgment of the bankruptcy court and determined that Appellee Benethel Rembert's debts to Appellants were dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). For the following reasons, we AFFIRM the decision of the district court.

I.

Appellee Benethel Rembert has worked for Chrysler Motors Corporation as an hourly-wage factory inspector for over twenty-eight years. In 1993, Rembert encountered financial difficulties resulting from an automobile accident, which caused her to miss work for several months. Rembert's

financial difficulties were exacerbated when, between 1994 and 1995, her income was reduced by one-third because she was unable to work overtime. During this time, Rembert had an established credit card account with Citibank and opened two separate credit card accounts with AT&T.

Rembert's financial woes continued. Between June 1994 and January 1995, Rembert incurred gambling losses of between $18,000 and $24,000, primarily at the Windsor Casino in Ontario, Canada. To finance her gambling, she withdrew thousands of dollars in cash advances from automated teller machines at the casino on her credit card accounts, including those with Citibank and AT&T. As a result of the heavy debts she had incurred by virtue of these withdrawals, Rembert obtained a second mortgage on her home in November 1994, in the amount of $28,000. Rembert used a significant portion of the loan proceeds to pay her credit card debts; on November 14, 1994, Rembert completely paid her Citibank balance of $5,936, and also paid a $3,051.86 balance on one of her AT&T accounts.

Despite her mounting losses and the second mortgage on her home, Rembert continued to gamble and withdraw cash advances. By January 1995, Rembert again owed substantial amounts on her Citibank and AT&T accounts. During that time, Rembert made additional payments of approximately $2000 to Citibank and approximately $1500 to AT&T.

On April 20, 1995, Rembert filed a petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 701, *et seq.* Thereafter, Citibank and AT&T initiated adversary proceedings against her, seeking a determination that

Rembert's debts to them were nondischargeable under 11 U.S.C. § 523(a)(2)(A). The two adversary proceedings were consolidated and tried together in the bankruptcy court.

At trial, Rembert testified that at the time she was obtaining cash advances for gambling, she believed that she would be able to win enough money to repay her credit card debts. There was no evidence indicating that she did not intend to repay the cash advances from Citibank and AT&T. Notwithstanding, the bankruptcy court found that Citibank and AT&T had established that, at the time Rembert obtained the cash advances, she intended to defraud Citibank and AT&T in connection with these debts. Accordingly, the bankruptcy court determined these debts to be nondischargeable under § 523(a)(2)(A). The bankruptcy court based its finding of fraudulent intent on an objective analysis of both Rembert's intent and ability to repay, concluding that Rembert: (1) did not intend to repay the debt; and (2) had reason to know that she would not be able to repay it.[1] In

---

[1] The bankruptcy court concluded that

> [t]he Debtor testified here today that at the time she incurred the debts at issue, using these credit cards primarily for gambling purposes--she expected and knew that the only way she would be able to repay them was through gambling winnings. She also recognizes now, and it is, of course, objectively true, that there is not a reasonable expectation [of repaying the debts through gambling].
>
> . . . .
>
> She may have hoped in her heart of hearts that she would be able to repay, but she 'knew that it was not

addition to determining that the debts were nondischargeable, the bankruptcy court entered judgment in favor of Citibank and AT&T in the amount of $6299.71 and $5323.77, respectively.

The district court reversed, finding that the bankruptcy court clearly erred because Citibank and AT&T had failed to establish that Rembert had the requisite fraudulent intent under § 523(a)(2)(A) at the time she obtained cash advances. Citibank and AT&T have timely appealed the judgment of the district court.

II.

"We review a bankruptcy, appeal differently than a typical appeal from the district court. The bankruptcy court makes initial findings of fact and conclusions of law. The district court then reviews the bankruptcy court's findings of fact for clear error and the bankruptcy court's conclusions of law de novo." *Wesbanco Bank Barnesville v. Rafoth (In re Baker & Getty Fin. Servs. Inc.),* 106 F.3d 1255, 1259 (6th Cir.) (citing Bankr. Rule 8013), *cert. denied,* 118 S. Ct. 65 (1997). We in turn review the bankruptcy court's findings of fact for clear error and the district court's legal conclusions de novo. *See id.* (citing *First National Bank v. Rafoth (In re Baker & Getty Fin. Servs., Inc.),* 974 F.2d 712, 717 (6th Cir. 1992)). "A factual finding will only be clearly erroneous when, although there is evidence to support it, the reviewing

---

objectively realistic, or real [,]or reasonable to have such an expectation: and therefore, that she would not have the ability or intent to repay. J.A. at 673-74.

court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Ayen*, 997 F.2d 1150, 1152 (6th Cir. 1993) (citations and quotation omitted).

III.

Citibank and AT&T contend that Rembert's debts to them should have been excepted from discharge under § 523(a)(2)(A). That provision of the bankruptcy code provide:

> (a) A discharge under section 727... of this title does not discharge an individual debtor from any debt--
>
> (2) for money, property, services, or any extension, renewal, or refinancing of credit, to the extent obtained by-
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably[2]

---

[2] Under the Supreme Court's decision in *FieM v. Mans*, 516 U.S. 59 (1995), this subjective "justifiable" reliance standard

relied on the false representation; and (4) its reliance was the proximate cause of loss. *See Long§ v. McLaren (In re McLaren),* 3 F.3d 958, 961 (6th Cir. 1993). In order to except a debt from discharge, a creditor must prove each of these elements by a preponderance of the evidence. *See Grogan v. Garner,* 498 U.S. 279, 291 (1991). Further, exceptions to discharge are to be strictly construed against the creditor. *See Manufacturer's Hanover Trust v. Ward(In re Ward),* 857 F.2d 1082, 1083 (6th Cir. 1988).

The focus in the present ease is on the first two elements of the *McLaren* test: material misrepresentation and intent to defraud. Whether a debtor possessed an intent to defraud a creditor within the scope of § 523(a)(2)(A) is measured by a subjective standard, *see Field v. Mans, 516 U.S.* 59, 116 S. Ct. 437, 444 (1995); thus, we must determine whether Rembert had a subjective fraudulent intent, based on her representations to Citibank and AT&T. In so determining, we first must consider the nature of those representations.

The use of a credit card represents either an actual or implied intent to repay the debt incurred. *See, e.g., Chevy Chase Bank FSB v. Briese (In re Briese),* 196 B.R. 440, 449-50 (Bankr. W.D. Wis. 1996); *Chase Manhattan Bank v. Murphy (In re Murphy),* 190 B.R. 327, 332 (Bankr. N.D. Ill. 1995); The *GM Card v. Cox (In re Cox),* 182 B.R. 626, 628 (Bankr. D. Mass. 1995). Subject to more debate, however, is the issue of whether the debtor's representation includes a

---

was incorporated into the test for fraudulent intent under § 523(a)(2)(A). 'Previously, in the Sixth Circuit, creditors had to satisfy an objective "reasonable' reliance standard under § 523(a)(2)(A).

representation that she has an ability to repay the debt. *Compare Anastas v. American Savings Bank (In re Anastas),* 94 F.3d 1280, 1287 (9th Cir. 1996) (the representation made by the card holder in a credit card transaction is not that he has an ability to repay the debt), *and AT&T Universal CardServ. Corp. v. Feld(In re Feld),* 203 B.R. 360, 367 (Bankr. E.D. Pa. 1996) ("We therefore reject those cases that measure a debtor's intention to repay by her ability to pay."), *with Mercantile Bank v. Hoyle (In re Hoyle),* 183 B.R. 635, 638 (Bankr. D. Kan. 1995) (debtor implied that he had ability to repay when he took out cash advances) *and Bank One Columbus, N.A. v. McDonald (In re McDonald),* 177 B.R. 212, 216 (Bankr. E.D. Pa. 1994) (the act of using a credit card carries the implied representation that the debtor has the ability to repay the debt).

We believe that "the representation made by the cardholder in a credit card transaction is not that he has an ability to repay the debt; it is that he has an intention to repay." *Anastas,* 94 F.3d at 1287. To measure a debtor's intention to repay by her ability to do so, without more, would be contrary to one of the main reasons consumers use credit cards: because they often lack the ability to pay in full at the time they desire credit. *See Feld,* 203 B.R. at 368 (citing *Briese,* 196 B.R. at 448). Further, the language of§ 523(a)(2)(A) expressly prohibits using a "statement respecting the debtor's or an insider's financial condition" as a basis for fraud. As noted by the Ninth Circuit, the focus should not be on whether the debtor was hopelessly insolvent at the time he made the credit card charges. A person on the verge of bankruptcy may have been brought to that point by a series of unwise financial choices, such as spending beyond his means, and if ability to repay were the focus of the fraud inquiry, too

often would there be an unfounded judgment of non-dischargeability of credit card debt. Rather, the express focus must be solely on whether the debtor maliciously and in bad faith incurred credit card debt with the intention of petitioning for bankruptcy and avoiding the debt. A finding that a debt is non-dischargeable under 523(a)(2)(A) requires a showing of actual or positive fraud, not merely fraud implied by law . . . .While we recognize that a view to the debtor's overall financial condition is a necessary part of inferring whether or not the debtor incurred the debt maliciously and in bad faith, . . . the hopeless state of a debtor's financial condition should never become a substitute for an actual finding of bad faith.

Anastas, 94 F.3d at 1285-86 (citations omitted). Thus, we hold that the proper inquiry to determine a debtor's fraudulent intent is whether the debtor subjectively intended to repay the debt.

We are not unsympathetic to Appellants' claim that a subjective analysis of a debtor's fraudulent intent is extremely difficult to establish. Clearly, debtors have an incentive to make self-serving statements and will rarely admit an intent not to repay. In particular, compulsive gamblers often will have a subjective (albeit often baseless) intent to repay their gambling debts with their "expected" winnings, which is fueled by the very nature of their addictions. Thus, a debtor's intention -- or lack thereof-- must be ascertained by the totality of the circumstances. *See Feld,* 203 B.R. at 367.

Some courts have adopted a nonexclusive list of twelve factors to consider when determining whether a debtor

intended to repay the debt.[3] *See, e.g., Ellingsworth v. AT&T Universal CardServ. (In re Ellingsworth),* 212 B.R. 326, 334-35 (Bankr. W.D. Mo. 1997). Although we believe that "factor-counting" is inappropriate when applying a subjective standard, *see Murphy,* 190 B.R. at 334, the enumerated factors could help to determine the debtor's state of mind when she represented her intention to repay. "What courts need to do is determine whether all the evidence leads to the conclusion that it is more probable than not that the debtor had the requisite fraudulent intent. This determination will

---

[3] These factors are: (1) the length of time between the charges made and the filing of bankruptcy; (2) whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made; (3) the number of charges made; (4) the amount of the charges; (5) the financial condition of the debtor at the time the charges are made; (6) whether the charges were above the credit limit of the account; (7) whether the debtor made multiple charges on the same day; (8) whether or not the debtor was employed; (9) the debtor's prospects for employment; (1 0) financial sophistication of the debtor, (11) whether there was a sudden change in the debtor's buying habits; and (12) whether the purchases were made for luxuries or necessities. *See Citibank South Dakota, N.A.v. Dougherty (In re Dougherty),* 84 B.R. 653,657 (9th Cir. B.A.P. 1988) (citing *Sears Roebuck and Co. v. Faulk (In re Faulk),* 69 B.R. 743,757 (Bankr. N.D. Ind. 1986)), *abrogated on other grounds, Grogan v. Garner,* 498 U.S. 279 (1991). It should be noted that even the Ninth Circuit, which decided *Dougherty,* has recognized that the twelve-factor test has "been criticized because it does not consider all the common law elements of frand, particularly misrepresentation and reliance." *Citibank (South Dakota), N.A. v. Eashai (In re Eshai),* 87 F.3d 1082, 1088 (9th Cir. 1996) (citing *The GMCardv. Cox (ln re Cox),* 182 B.R. 626,637 (Bankr. D. Mass. 1995)).

require a review of the circumstances of the case at hand, but not a comparison with circumstances (a/k/a/'factors') of other cases." *Id.*

IV.

Turning to the present case, we conclude that the bankruptcy court erred by considering Rembert's ability to repay, as well as her intent to repay. Focusing on Rembert's intent to repay, there was no evidence presented to the bankruptcy court indicating that Rembert used the credit cards without intending to repay the Appellants. In response to questions from the bankruptcy judge, Rembert asserted that, at the time she took the cash advances from the Appellants, she thought that she would win enough money to pay her debts. Rembert did admit in hindsight that her belief that she would win enough to repay the Appellants was objectively unreasonable; however, Rembert's admission would be relevant only to the extent that it indicated an intention on her part not to repay the Appellants.

Looking at the totality of the circumstances, Rembert's conduct was entirely consistent with a subjective intent to repay Appellants. She took out a second mortgage on her home in the amount of $28,000 and used almost all the loan proceeds to pay her credit card debts. Thereafter, she continued to make substantial payments on her credit card debts to the plaintiffs during the time when she continued to gamble and lose. Even after she stopped obtaining cash advances on her Citibank and AT&T credit cards, Rembert made additional payments to them. These facts indicate that Rembert subjectively intended to repay her debts. The fact that Rembert later admitted that it probably was not

reasonable to believe that she would win enough money to repay the Appellants does not indicate a subjective intent not to repay her debts in this case. Accordingly, under the totality of the circumstances, we conclude that the bankruptcy court clearly erred in determining that Rembert possessed the necessary fraudulent intent for purposes of § 523(a)(2)(A).

We thus agree with the district court's findings that at the time Rembert incurred the debts at issue she intended to repay them and believed that she would have the means to do so from her gambling winnings. Accordingly, the district court properly reversed the judgment of the bankruptcy court.

Because there was no fraudulent intent in this case, we need not consider the other elements necessary to establish actual fraud. Appellants failed to establish Rembert's intent to defraud by a preponderance of the evidence; we therefore conclude that Rembert's debts to Appellants were not subject to exception from discharge pursuant to § 523(a)(2)(A).

V.

For the foregoing reasons, we **AFFIRM** the district court's order reversing the judgment of the bankruptcy court.

CONCURRENCE

KRUPANSKY, Circuit Judge, concurring. I concur in the majority's disposition in concluding that the bankruptcy court focused myopically on the objective unreasonableness of Rembert's gambling, and then erroneously imputed an intent to defraud Citibank and AT&T to Rembert despite her acknowledged plan to win money -- enough money to repay her credit card indebtedness -- by continuing to gamble. *Cf. Milwaukee Auction Galleries Ltd. v. Chalk,* 13 F.3d 1107, 1109 (7th Cir. 1994) ('[N]onperformance is not enough to ground . . . an inference [of fraudulent intent]; there must be additional evidence of the defendant's intentions at the time he made the promise."). Nevertheless, I write separately to distinguish between the analysis previously employed by this court and the rationale impressed by the Ninth Circuit in *In re Anastas,* 94 F.3d 1280 (9th Cir. 1996), upon which the majority opinion relies.

In *In re Ward,* 857 F.2d 1082 (6th Cir. 1988), this court explained that the "initial issuance of credit" provides the critical moment at which a potential credit card holder represents an individual ability or intent to repay incurred indebtedness and the relevant lending institution elects to rely upon or reject such representation. *Id.* at 1085; *see id.* at 1087 (Merritt, J., dissenting) (criticizing the majority for arriving at its conclusion). The court in *Ward* affirmed a bankruptcy court's judgment that a debtor's obligation to a credit card company was properly dischargeable absent any evidence that the company "conducted even the most superficial credit investigation" when the debtor applied for and received a credit card based upon false and fraudulent statements. *Id.* at 1084. Although the court discussed the probability that "each

credit card charge [could] constitut[e] a 'representation,'" lnctepenaenriy capaoie or giving rise to an allegation of fraud, it discounted that probability by observing that "credit card companies . . . profit from extending [revolving] consumer credit at the risk of non-payment, which risk is factored into finance charges which are higher than the rates charged by other lenders." Id. While not foreclosing the possibility that a credit card holder could impliedly represent to a lending institution his intent and ability "to pay the incurred indebtedness *each time* he uses the card," rather than only when he *initially applies* for the card, the court explained that "a credit check must be conducted at some point; otherwise an exception to discharge is unavailable." *Id.* at 1085.

In the instant case, the majority has adopted the rationale articulated in *Anastas* and elected to recognize the kind of credit card fraud urged by the dissent and tentatively rejected by the majority in *Ward*. *See* Maj. op. at 6. Consequently, when Rembert engaged in each, individual transaction using her cards, she necessarily and concomitantly manifested "either an actual or implied intent to repay the debt incurred." Maj. op. at 6. This acknowledgment, in itself, is not objectionable to precedent. *See Ward,* 857 F.2d at 1085 (leaving open the possibility that such a cause of action could exist). Nevertheless, the majority's silence with respect to the balance of the fraud inquiry implicitly calls the remainder of the *Ward* mandate into question.

The fundamental pronouncement of *Ward* required that "[a] lender must investigate creditworthiness and ferret out ordinary credit infottnation" as a precondition to preventing the discharge of debts allegedly procured by fraud. Id. at 1086. Accordingly, *Ward* would require a lending institution

to show justified reliance on any alleged misrepresentation by the card holder in her individual transactions only by demonstrating that it had made routine or periodic credit investigations of her continued credit-worthiness following the initial, pre-approved extension of her credit line. This analysis comports with the law of this circuit regarding the elements of fraud. *See In re Phillips,* 804 F.2d 930, 932-33 (6th Cir. 1986) (recognizing the need for reasonable reliance on the part of the lender), overruled in part by Field v. Mans, 516 U.S. 59, 72-75 (1995) (substituting "justifiable" for "reasonable" reliance). Moreover, it serves as a prudential rule that does not usurp the autonomy of lending institutions, which may elect to assume "the risk of non-payment, which risk is factored into finance charges which are higher than the rates charged by other lenders." *Ward,* 857 F.2d at 1085; *see FirstNat'lBank of Mobile v. Roddenberry,* 701 F.2d 927, 932 (1 lth Cir. 1983) ("[O]nce credit is extended, the bank must decide when and if credit will be revoked. It is not the function of the courts to determine when a bank ought to revoke credit.") (emphasis added).

Although these principles enjoy continuing vitality in this forum, the circuit that decided *Anastas* the case which provides the substantive anchor for the majority's rationale -- does *not* require a creditor to investigate the credit-worthiness of its credit card holder beyond the initial review conducted at the time it extended credit to demonstrate justified reliance upon the implied representations made for the each subsequent transaction of the customer. *See In re Eashai,* 87 F.3d 1082, 1091-2 (9th Cir. 1996). *But see id.* at 1093 (O'Scannlain, J., concurring) ("[T]he credit Card issuer is not entirely blameless . . . ."). Because the majority resolved the instant controversy by approving of the district court's conclusion

that Rembert made no misrepresentation, it did not need to address the justification for her creditors' reliance on her representations. Although this omission constitutes a proper exercise in prudential adjudication, I write separately to emphasize that the majority's silence should not be read to embrace the Ninth Circuit's analysis of reliance in cases of alleged credit card fraud. The view articulated in *Eashai* conflicts with the decree of *Ward,* which remains the controlling precedent in this court.

APPENDIX B

No. 96-2293

Filed May 29, 1998
Leonard Green, Clerk
United States Court of Appeals
For The Sixth Circuit

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: BENETHEL REMBERT, *Debtor*	)	
BENETHEL REMBERT, *Appellee*,	)	
v.	)	**ORDER**
AT&T UNIVERSAL CARD SERVICES, INC.; CITIBANK SOUTH DAKOTA, N.A., *Appellants*.	)	

BEFORE: **KRUPANSKY**, **DAUGHTREY**, and **COLE**, Circuit Judges.

The court having received a petition for rehearing en

banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/_____
Leonard Green, Clerk,

* Judge Clay recused himself from participation in this ruling.

APPENDIX C

No. 96-2293

Filed September 25, Clerk
United States District Court
Eastern District of Michigan

UNITED STATES DISTRICT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BENETHEL REMBERT, *Appellant*(s)	)	
v.	)	No. 96-70317-DT Paul D. Borman U.S. District Judge
CITIBANK SOUTH DAKOTA, N.A., *Appellee(s)*	)	Bankr No. 95-44168 Adv. No. 95-4677

BENETHEL REMBERT, *Appellant*(s)	)	
v.	)	No. 96-70315-DT
AT&T UNIVERSAL CARD,	)	Bankr No. 95-44168

96-70317-DT *Rembert v. Citibank South Dakota, N.A.*
96-70315-DT *Rembert v. AT&T Universal Card Services*

SERVICES,) Adv. No. 95-4677
Appellee(s))
_____/

AMENDED

OPINION AND ORDER REVERSING THE RULING OF THE BANKRUPTCY COURT, AND GRANTING DISCHARGEABILITY OF APPELLANT'S DEBTS UNDER 11 U.S.C. § 523(a)(2)(A)

The Court has before it Appellant Benethel Rembert's appeal of the Bankruptcy Court's decisions in the above two matters that were consolidated for trial. The Bankruptcy Judge held that Appellant's credit card debts to Appellees were not dischargeable under 11 U.S.C. § 523(a)(2)(A), which prohibits discharge from debts "obtained by false pretenses, a false representation, or actual fraud".

Having reviewed the parties' briefs and the transcript of the trial before the Bankruptcy Court, and having heard oral argument on August 27, 1996, this Court reverses the Bankruptcy. Judge's decision and grants dischargeability of the debts in both cases for the reasons stated below. Background:

Appellant Benethel Rembert has been gainfully employed by Chrysler Motors for almost 29 years. She currently works as an hourly wage' factory inspector, 'earning between $36,000 and $45,000 per year, depending

upon overtime pay[1]

In January, 1990, Appellant opened a credit card account with Appellee Citibank South Dakota, N.A. ("Citibank"). In 1994, Appellant opened two credit card accounts with Appellee AT&T Universal Card Services CAT&T"), one in, April, and another in September. Both AT&T accounts provided Appellant with lines of pre-approved credit.[2]

---

[1] In 1993, Appellant was injured in a car accident and was forced to take a couple of months off from work. Between 1994 and 1995, Appellant's pay was reduced by one third because she was unable to work overtime.

[2] AT&T Investigations Manager Paul Patterson testified at trial that Ms. Rembert had been pre- approved for each of the two AT&T credit cards when she was sent letters requesting that she sign up to receive them:

Pre-approved solicitation is where the -- basically, the credit check has been done prior to sending the application to the individual. It shortcuts the time needed to issue the card once requested.

Q. [Appellant's attorney] Okay. And when you say, "once requested," it means you're -- are actually mailing them out, or mailing out applications to people, and saying, "hey, sign this, and then you can get the card"?
A. That is correct.
Q. Okay, and that happened on both of Ms. Rembert's cards; correct?
A. That is correct.

In late 1994, Appellant began to suffer losses from gambling at the Windsor, Ontario, Canada Casino. As a result of the increasing debt, in November, 1994 Ms. Rembert obtained a second mortgage on her house in the amount of $28,000 and used some of the proceeds to pay on her debts to Appellees: on November 14, 1994 she paid $5,936 to Citibank and $3,051.86 to AT&T.[3]

In late November and December of 1994, Appellant obtained thousands of dollars in cash advances on Appellees' credit cards at Casino Windsor. She did not attempt to hide from Appellees her intended use of the money by obtaining these advances at less obvious locations and then transporting the funds to the Casino. Between June, 1994 and January, 1995, Appellant incurred gambling losses of between $18,000 and $24,000. Appellant did not obtain any cash advances on Appellees' credit cards after January of 1995.

Appellant testified at trial that at the time she was obtaining cash advances for gambling at Casino Windsor, she thought she would win back the money and repay the credit card debts. Nothing in her trial testimony evidences (1) that she gambled to lose money, or (2) that at the time of her gambling with these funds she did not expect to repay these debts.

Trial Transcript at 76-77.

[3] She also made the following payments from these proceeds to other creditors: $11,000 to M.B.N.A.; $3000 to Sears; and $1800 to J.C. Penney. Rembert, Trial Transcript at 24-28.

In December, 1994 and January, 1995 Appellant made two payments totaling $2000 toward her Citibank debt. Appellant also made payments totaling $1,549.19 to AT&T from November, 1994 through March, 1995.

On April 20, 1995, Appellant filed a Petition for Bankruptcy under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 701 et seq., Appellees Citibank and AT&T initiated adversary proceedings against Appellant, consolidated for trial, alleging that Appellant's debts to them were non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

After a trial on January 10, 1996, the Bankruptcy Judge found that Appellant's state of mind, at the time she incurred the debts, exhibited a fraudulent intent, and therefore rendered her debts to Appellees non-dischargeable under § 523(a)(2)(A):

> The Debtor testified here today that at the time she incurred the debts at issue, using these credit cards primarily for gambling purposes -- she expected and knew that/he only way she would be able to repay them was through gambling winnings. She also recognizes now, and it is of course objectively true, that is not a reasonable expectation.
>
> * * *
>
> [T]he Court concludes that by a preponderance of the evidence the 'Plaintiff has established that at the time she incurred this debt, the Debtor did not intend to repay, and knew that she would not reasonably be able

to repay.

* * *

> She may have hoped in her heart of hearts that she would be able to repay, but she knew that it was not objectively realistic, or real -- or reasonable to have the ability or intent to repay.

Trial Transcript at 119-20.

The Bankruptcy Judge entered (1) an Order in favor of Appellee Citibank in the amount of $6,299.71 and (2) an Order in favor of Appellee AT&T in the amount of $5323.77. Appellant, Benethel Rembert now appeals the Bankruptcy Court's decisions. This Court reverses, as clearly erroneous, the finding of the Bankruptcy Court that a preponderance of evidence established that at the time she incurred this debt, Ms. Rembert (1) did not intend to repay and (2) had reason to know that she would not be able to repay. This Court concludes that Appellees Citibank and AT&T have not met their evidentiary burden -- they have not established by a preponderance of the evidence that at the time she incurred her debts with them, Ms. Rembert did not intend to repay those debts and/or knew that she would not reasonably be able to repay those debts.

Discussion:

"An appellate court reviews a bankruptcy court's decision to determine whether its factual findings are clearly erroneous and its legal conclusions, which are subject to de novo review

on appeal, are correct." In re Caldwell, 851 F.2d 852, 858 (6th Cir. 1988). The district court may not make its own indepenclent factual findings.

A lower court's finding with respect to intent is a factual determination and therefore may be set aside only if clearly erroneous. National Bank of Commerce v. Lazar, 192 B.R. 161 (Bankr. W.D.Tenn. 1995). A finding of fact is clearly erroneous if, after examining the evidence, the ,reviewing court "is left with the firm and definite conviction that a mistake has been committed." Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985).

Title 11 U.S.C. § 523(a)(2)(A)provides:
(a) A discharge under section 727... of this title does not discharge an individual debtor from any debt --

(2) for money., to the extent obtained by --
(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an .insider's financial condition.

In order to except a debt from discharge under § 523(a)(2)(A)[4] a creditor must prove the following elements: (1) the debtor obtained-money through a material

---

[4] While § 523(a)(2)(A) lists three separate grounds for dischargeability: actual fraud, false pretenses, and false representation, the Sixth Circuit has articulated this single test to be applied to determine all three types of fraudulent acts.

misrepresentation that at the time the debtor knew was false or made with gross recklessness as to its troth; (2) the debtor intended to deceive; (3) the creditor justifiably[5] relied on the false representation, and (4) its reliance was the proximate cause of loss. In re McLaren, 3 F.3d 958, 961 (6th Cir. 1993). A creditor seeking to except a debt from discharge under § 523 must prove each element of its claim by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991). Exceptions to discharge are to be strictly construed against the creditor. In re Ward, 857 F.2d 1082, 1083 (6th Cir. 1988). The Congressional intent behind the Bankruptcy Code is to give the honest but unfommate debtor a fresh start. Grogan, 498:U.S. at 286-87. The Sixth Circuit has pointed out that there is no justification for extending preferential protection to credit card companies:

> This court rejects extending preferential protection, at the expense of other unsecured creditors, to credit card companies which profit from extending consumer credit at the risk of non-payment, which risk is factored into finance charges which are higher than the rates charged by other lenders.

In re Ward, 857 F.2d at 1083. The Court of Appeals.further

---

[5] The Supreme Court decision in Field v. Mans, 116 S.Ct. 437 (1995) changed the Sixth Circuit McLaren reliance standard for creditors from the objective 'reasonable' standard, to the subjective 'justifiable' standard. This is not an issue in the instant case, because the focus is on the debtor's intent and not the creditor's.

stated,

> Banks are willing to risk non-payment of [credit card] debts because that risk is factored into finance charges. Because the risk is voluntary and calculated, Section 523 should not be construed to afford credit card issuers more protection than is given to all other creditors.

Id. (quoting First Nat'l Bank of Mobile v. Roddenberry, 701 F.2d 927, 932 (11th Cir. 1983)). AT&T Investigations Manager Paul Patterson testified that his company did not run any credit checks on Ms. Rembert during the period she was an AT&T cardholder.[6]

---

[6]

Q. All right, over the months that Ms. Rembert had her cards and spent several thousands and got several thousands into AT&T, did you ever in the time period run a credit check on her to see if she had other debts and was getting in over her head? A. No,

Trial Transcript at 76-77.

Q. [Appellant's attorney] And so never having run these checks, you assumed you'd be paid back, but you really had no idea, did you?
A. Yes.
Q. Okay. And so by now knowing, you assumed a risk that maybe she wouldn't be able, didn't you?
A. That is correct.

The type of fraud which comes within the ambit of § 523(a)(2)(A) is actual fraud, which involves moral turpitude or intentional wrong. In re Phillips, 804 F.2d 930, 932 (6th Cir. I986). Fraud implied in law, or which may exist without imputation of bad faith or immorality is insufficient. Collier on Bankruptcy ¶ 532.08(4). In order to prove actual fraud, it is necessary to show that the debtor intended to deceive the creditor in an attempt to obtain money. In re McLaren, 3 F.3d at 961. If room exists for the court to infer honest intent, the issue of dischargeability must be decided in favor of the debtor. In re Johnny Mac Roberts, 193 B.R. 828, 830 (Bankr. W.D. Mich. 196).

Trial Transcript at 95.

The factual evidence at the instant trial does not support the Bankruptcy Judge's decision. In her answers to the questioning by the Bankruptcy Judge, Ms. Rembert testified as follows:

> Q. Judge: And let me just ask you this -- this importanf question: At the time you were borrowing this money forgambling, $18,000 to $24,000 in this six or seven month period, how did you think you were going to be able to pay it back?
>
> A. I thought I was going to win.
>
> Q. Do you recognize now that that. was not a reasonable expectation on your part?
>
> A. Yes. I recognized it before now.
>
> Q. When did you first recognize it?
>
> A. In '95. I'll say when I knew I couldn't pay.
>
> Q. When was that?
>
> A. Maybe the spring of '95.
>
> Q. But you had stopped gambling by then.
>
> A. Yeah. I had to.

Trial Transcript at 54 (emphasis added).

Additional trial testimony by Ms. Rembert supports this Court's conclusion in favor of discharge:

All the way until the end, I was trying to get my money back . . . I even tried to not file for bankruptcy.

Trial Transcript at 37.

Q. Appellant's Attorney: Did you ever take money from Citibank without intending to pay it back?

A. No.

Q. Did you ever take money from AT&T without intending to pay it back?

A. No.

Q. Okay. Did you assume, when you were gambling, and you we. re taking cash advances on that, you would win, and would be able to pay that money back?

A. I did.

Trial Transcript at 46.

Ms. Rembert testified that, at the time of her gambling she believed that her winnings would pay back her debts, and that she did not recognize that her expectation that she would repay was not reasonable until the spring of '95 -- well after her last cash advance (January, 1995). There is no evidence

in the record to support the Bankruptcy Judge's finding that Appellant had the requisite fraudulent intent or intent to deceive at the time of the cash advances in question.

The fact that Appellant hoped to repay her debts through gambling winnings is not per se unreasonable. In re Alvi, 191 B.R. 724, 734 n. 19 (Bankr. N.D. Ill. 1996) ("This Court knows of no legal rule which establishes that a debtor who hoped to win at gambling per se cannot show the requisite intent to repay."); Chemical Bank v. Clagg, 150 B.R. 697, 698 (Bankr. C.D. Ill. 1993) ("There is no basis for treating a debt that arose from legal gambling any differently from other debts legally incurred.") The court in In re Alvi, commented that, "If Congress intended for all debts incurred in connection with gambling to be found non-dischargeable, it could have done so. It did not single out gambling debts for any special treatment in bankruptcy cases." 191 B.R. at 734 n. 19. Moreover, in In re Chomakos v. Flamingo Hilton, 69 F.3d 769 (6th Cir. 1995), cert. denied sub nom, Allard v. Hilton, 116 S.Ct. 1568 (1996), the Sixth Circuit, in considering whether gambling bets were voidable under the Bankruptcy Code held that "[w]here gambling is lawful.., the placing of a bet gives rise to legally enforceable contract rights... "and therefore is not a fraudulent conveyance. Id at 771. The Court noted that if instead of gambling, the Chomakos had spent the money on expensive dinners, the creditors would have been no better off than they are now. Id. at 772.

Ms. Rembert gambled to win money, not to lose money. At the time of her gambling she hoped to pay off her debts with gambling winnings. The fact that she did not win

does not label her a fraudulent offender. By gambling, she was acting in a manner that could have resulted in her being able to pay off her gambling debts. Would Apl6ellees have rejected payment if she had paid off her debts with earnings from legal gambling activity? Certainly not! Her conduct was consistent with her testified-to intent at that time -- an intention to pay off her credit.card debts.

Gambling is a risky investment. But so too is trying to start a successful small business, or investing in derivatives, or investing in heating oil futures or penny stocks. These are all risky endeavors that most of the time do not pan out. Unfortunately, bankruptcy is the route taken by many individuals whose risky investments do not pan out. If the risky investment succeeds, the lenders, be they credit card companies or banks are made whole. If the investment fails, then their risk does not pay off. That the credit card company's risk in advancing money does not pan out does not mm the debtor into an individual guilty of defrauding the creditor.

There is no basis for finding that Ms. Rembert made a false representation to Appellees when she incurred debts in the latter part of 1994. There is no evidence that she had sought bankruptcy on a prior occasion. There is no evidence that she had a history of obtaining funds and not repaying them. The Appellees have not met their evidentiary burden. They did not provide the preponderance evidence necessary to support the Bankruptcy Judge's factual findings.

This Court has based its decision upon direct evidence Ms. Rembert's testimony and the other evidence before the

Bankruptcy Judge. In the absence of direct evidence, some courts consider twelve factors[7] in determining the existence of intent. See In re Alvi, supra. This Court rejects this twelve factor test in analyzing the instant case, finding that they fail to address the subjective intent of the debtor necessary for a finding of fraud: "[d]ebtors can honestly, but mistakenly, believe that they have the ability to repay their debts . . . . the Court cannot require the Debtor to have a [sic] objectively reasonable basis for his belief[.]" 19t B.R. at 733.

The Bankruptcy Cotirt in the instant case did not apply the twelve factors because it concluded that Appellant's trial testimony provided a preponderance of evidence supporting a finding of the requisite fraudulent intent. This Court agrees that there is no reason to apply the twelve factor test, but for the opposite reason -- because Appellant's trial testimony

---

[7] The twelve factors are: (1) the length Of time between the charges were made and the filing; (2) whether a bankruptcy attorney was consulted before the charges were made; (3) the number of charges made; (4) the amount of the charges; (5) the debtor's financial condition at the time the charges were made; (6) whether the charges were above the credit limit; (7) whether the debtor made multiple charges on the same day; (8) whether the debtor was employed; (9) the debtor's prospects for employment; (1 O) the financial sophistication of the debtor; (11) whether there was a sudden change in the debtor's buying habits; (12) whether the purchases were made for luxuries or necessities. In re Johnny Mac Roberts, 193 B.R. at 831.

impelled a clear finding of no fraudulent intent.[8]

---

[8] This Court notes, in dicta, that application of the 12 factors to the instant case, would not establish by a preponderance of evidence, fraudulent intent on the part of Appellant:

> (1) Appellant filed for bankruptcy on April 20, 1995, four months after the last cash advance in question.
> (2) She did not contact an attorney until after she stopped using the credit cards.
> (3) & (4) The amount of cash advances was higher than usual.
> (5) & (6) While Appellant's financial condition at the time of the charges was not good, there was evidence that she had continuously sought to pay on her credit card debt. There was no clear trial testimony with respect to the actual limits on ail of Appellant's cards, and whether or not she exceeded them from November 1994 until January 1995.
>
> AT&T Investigations Manager Paul Patterson testified that in mid-November, 1994, Ms. Rembert had paid off her entire debt of $3,015.86 on one of the AT&T cards (account #2176). Trial Testimony, at 71. Ms. Rembert continued to gamble and lose, and the total debt on both AT&T credit cards rose to about $5,700 by the end of December, 1994. Patterson testified that Appellant had made a subsequent payment of about $700 on that debt during the period after her gambling ceased and before she filed for

96-70317-DT *Rembert v. Citibank South Dakota, N.A.*
96-70315-DT *Rembert v. AT&T Universal Card Services*

A recent decision by the United States Court of Appeals for the Ninth Circuit rejected a claim of fraud by credit card companies against a bankrupt who had sought discharge of debts from gambling activities; "the bankruptcy court was clearly erroneous in finding an intent to defraud." Anastas v. American Savings Bank, F. 3d (9th Cir. 1996), 1996 WL 495160 9th Cir., September 3, 1996. The Ninth Circuit decision stated:

> [T]he central inquiry in determining whether there was a fraudulent representation is whether the card holder lacked an intent to

---

bankruptcy. Id. at 73, 75. Patterson further acknowledged that Ms. Rembert maintained a record of consistent monthly payments to AT&T until January, 1995. Id. at 76.

(7) Appellant did make multiple charges on the same day.

(8) & (9) Appellant was employed at all relevant periods in the case.

(10) There is no evidence that Ms. Rembert was financially sophisticated. Her securing of a second mortgage on her house in November, 1994, evidenced a desire to pay on her debts, not financial sophistication to maintain a scheme.

(11) Appellant's charging habits changed; she sought more cash advances in November and December, 1994.

(12) Almost every charge at issue was used in gambling, which is not a necessity, but is a legal use of the funds.

repay at the time he made the charge.

> We-emphasize that the representation made by the card holder in a card transaction is not that he has an ability to repay the debt; it is that he has an intention to repay.
>
> . . . .
>
> Obviously, Anastas had a senous gambling problem. Although it may have beeri unlikely that he could win back the money to be able to pay back the cash advances that financed the gambling, the record fully supports Anastas' good faith intention to do so. There is no basis in the record for a funding of the type of malicious and bad faith intent not to repay that is necessary for a finding of actual fraud under section 523(a)(2)(A). Id. Slip Op. 6-7.

Conclusion:

For the reasons stated above, the Court **REVERSES** the ruling of the Bankruptcy Court in the adversary proceedings brought by Citibank South Dakota and AT&T Universal Card Services, and finds the credit card debts at issued to be dischargeable under 11 U.S.C, § 523(a)(2)(A).

SO ORDERED.

Dated: Sep. 25, 1996
Detroit, Michigan

/s/_____
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

APPENDIX D

Filed January 22, 1996
Clerk, U.S. Bankruptcy Court
Eastern District of Michigan

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

Benethel Rembert,
Debtor.

Bankruptcy No. 95-44168-SWR
Honorable Steven W. Rhodes
Chapter 7

AT&T Universal Card Services, Inc.)
Plaintiff,)
)
v.) **Adversary**
) **No. 95-4679**
Benethel Rembert,)
Defendant.)
_____/

ORDER DECLARING DEBT NON-DISCHARGEABLE AND FOR JUDGMENT IN FAVOR OF PLAINTIFF

This matter having come on for trial on January 10, 1996, trial having been held at the scheduledtime the Court

having taken testimony and, at the conclusion of proofs, the Court having rendered its opinion from the bench for the reasons stated on the
record, and being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that the debt of the Defendant, Benethel Rembert, owing to Plaintiff, AT&T Universal Card Services, Inc., on account numbers 5398-5700-5152-2176 and 5398-4000-2629-3721, is hereby declared non-dischargeable.

IT IS FURTHER ORDERED that Judgment is entered in favor of Plaintiff, AT&T Universal Card Services, Inc., and against the Defendant, Benethel Rembert, in the amount of Five Thousand Three Hundred and Twenty Three and 76/100 ($5,323.77) Dollars.

IT IS FURTHER ORDERED that this Judgment shall accrue interest at the statutory rates.

/s/_____
HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY JUDGE

APPROVED:

/s/_____
RICHARDO I. KILPATRICK (P35275)
DAVID H. LEWISTON (P16642)
THOMAS A. BALINSKI (P41771)
SHERMETA, CHIMKO & KILPATRICK, P.C.
Attorneys for Plaintiff
445 S. Livernois, Suite 221
Rochester Hills, Michigan 48307
(810) 652-8200

/s/_____
DAVID H. LEWISTON (P16642)
Attorney for Defendant
24901 Northwestern Hwy., Suite 314d
Southfield, Michigan 48075
(810) 355-1370

Dated: January 22, 1996

APPENDIX E

Lawyers Weekly USA
98 LWUSA 355/May 4, 1998

Newspaper Article (attached)

Credit Cards Easier to Discharge

B-1

Credit Cards Easier to Discharge

No 'Fraud' Despite Inability to Pay

By Jake Halpern

A woman who took $11,600 in cash advances on her credit cards in order to finance her gambling problem can discharge the debt in bankruptcy, says the Sixth Circuit.

This wasn't "fraud" that would be nondischargeable under 11 U.S.C. §523 (a)(2)(A), because she believed she could win back the money and pay off the debt.

The fact that she lacked the ability to repay the debt doesn't mean that she didn't *intend* to repay it, the court said — no matter how unrealistic or unreasonable her intent may have been.

The only other circuit to decide this issue — the Ninth — has held the same way. Lower courts are sharply split.

The decision makes it very difficult to prove fraud, creditors' lawyers complain.

"How do you prove that a debtor did not intend to pay? Unless they're out-and-out thieves, it's going to be impossible," says Washington lawyer Charlie Docter.

The court held that there was no "bad faith" in this case, noting that the debtor:

Linda Rubin

David Lewiston and Adam Wiener represented a client who took over $11,000 in cash advances on her credit cards to finance her gambling problem and then discharged the debt in bankruptcy.

- Had run up earlier credit card debts, and took out a second mortgage to repay them;
- Continued to make substantial payments at the same time she was taking cash advances; and
- Stated that she always intended to re-

Continued on page 19

BEST AVAILABLE COPY

Credit Cards Easier to Discharge in Bankruptcy

Continued from page 1

pay the money.

The court said this indicated that "at the time [the debtor] incurred the debts... she intended to repay them and believed that she would have the means to do so from her gambling winnings."

In the past, many lower courts have weighed a debtor's "ability" to repay a debt in determining whether he or she committed fraud, says attorney James Caher of Eugene, Ore., who has authored several books on bankruptcy. "Judges would say, 'Inability to repay equals fraud,'" he explains.

Under this new decision, creditors will have a much tougher time, says Philadelphia attorney Henry Sommer, who has written several books on consumer bankruptcy.

He says creditors might win only if there are extreme circumstances — "For example, if a guy took a $60,000 trip to France, knowing he was going into bankruptcy."

Must Be Malicious

The Sixth Circuit said the Bankruptcy Court below "clearly erred" in focusing exclusively on the debtor's financial condition rather than looking at the "totality of the circumstances."

It said, "We believe that the representation made by the cardholder in a credit card transaction is not that [she] has an ability to repay; it is that [she] has an intention to repay.

"To measure a debtor's intention to repay by her ability to do so, without more, would be contrary to one of the main reasons consumers use credit cards: because they often lack the ability to pay in full at the time that they desire credit."

The court said fraud occurs only if "the debtor maliciously and in bad faith incurred credit card debt with the intention of petitioning for bankruptcy and avoiding the debt."

It cited the Ninth Circuit case, which said that the "hopeless state of a debtor's financial condition should never become a substitute for an actual finding of bad faith." (*In re Anastas*, 94 F.3d 1280 (1996); 96 LWUSA 845; Search word for LWUSA Archives: Anastas.)

What Debtors Should Do

Experts say that whenever possible, debtors' attorneys should have their clients testify that they:

- Didn't incur the debt immediately prior to filing for bankruptcy;
- Tried to work out a payment plan with the creditor; and
- Wanted to repay the debt, but simply were unable to do so.

Sommer says that debtors should always try to propose a payment plan to their creditors and make a few payments to show their good faith.

"If a debtor makes an attempt to repay the debt, that makes it a lot harder to prove fraudulent intent," agrees Baltimore attorney Stuart Blatt, president of the National Association of Retail Collection Attorneys.

What the debt is for can also make a difference, says Sommer. "Buying luxury items certainly isn't as forgivable as buying groceries."

What Creditors Should Do

The ruling is bad news for creditors, lawyers say.

"This decision is going to be almost impossible to get around," says William Weissbeck, a creditors' attorney who practices in Chicago.

"Creditors are faced with a real uphill battle," agrees Robert Markoff, who also practices in Chicago. "If the debtor says she intended to pay, you're pretty much stuck."

Some lawyers think the decision could even encourage creditors to stop offering cash advances, perform more thorough credit checks or require debtors to fill out a new credit application every six months or so.

Barring that, experts say, the best advice for creditors is to:

- Focus on purchases, especially luxury items, made just before the debtor filed for bankruptcy;
- Determine exactly how much debt exists, because a court will consider this as part of the "totality of the circumstances;" and
- Review the debtor's credit application for inaccuracies in listed assets or income that suggest fraud.

U.S. Court of Appeals, 7th Circuit. In re Rembert, No. 96-2293. April 9, 1998. Lawyers Weekly USA No. 9913003 (23 pages). To order a copy of the opinion, call 800-933-5594. LWUSA

BEST AVAILABLE COPY